

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-2036

To be argued by
DAVID J. GOTTLIEB

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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EDWARD NEWFIELD,

Appellant,

-against-

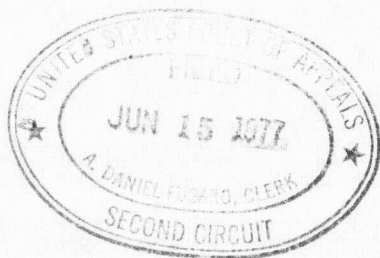
UNITED STATES OF AMERICA,

Appellee.
-----x

Docket No. 77-2036

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK



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BRIEF FOR APPELLANT

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ON APPEAL FROM AN ORDER
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QUESTIONS PRESENTED

1. Whether it was error for the trial judge to have failed to order a psychiatric inquiry pursuant to 18 U.S.C. §4244 when materials in appellant's pre-sentence report provided reasonable cause to believe that he might have been incompetent to stand trial.
2. Whether the district court erred by failing to hold an evidentiary hearing pursuant to the request for relief in the §2255 application.

STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This is an appeal from orders of the United States District Court for the Western District of New York (Burke, J.) entered on February 13, 1976, and March 10, 1976, denying without a hearing appellant Edward Newfield's application pursuant to 28 U.S.C. §2255 to vacate a judgment of conviction. On March 17, 1977, appellant's application to this Court for leave to proceed in forma pauperis was granted, and on April 18, 1977, this Court assigned The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal.

STATEMENT OF FACTS

A. The §2255 Proceedings

By a next of friend application filed January 14, 1976, appellant Edward Newfield sought to vacate a judgment imposed by the United States District Court for the Western District of New York on July 8, 1974, convicting him of one count of bank robbery, in violation of 18 U.S.C. §2113(a), and sentencing him to five years' imprisonment. Petitioner's claim was that at the time of his trial he was incompetent by reason of mental disorder to aid and assist in his defense. He also asserted that the files and records of the Government

put it on notice of this mental status, and that the Government therefore erred by failing to disclose such information or to move for a competency examination under 18 U.S.C. §4244. Petitioner supported his allegations by stating that on past occasions he was confined in mental hospitals and that on two occasions he was certified as suffering from the psychosis of schizophrenia.*

On February 13, 1976, the court below, without holding a hearing or receiving an answer from the Government, denied the application "upon the ground that the files and records of the case conclusively show that the petitioner is entitled to no relief."** With the exception of reference to a Rule 35 motion filed by appellant, the court's opinion contains no statement as to which "files and records" showed appellant not entitled to relief.

By motion filed February 20, 1977, appellant moved to amend the court's original order, alleging again that he was incompetent at the time of trial, and stating that there was irrefutable evidence that he was, at that time, suffering from schizophrenia.*** He stated that he was diagnosed as suffering from

*See motion to vacate judgment of conviction, "D" to the separate appendix to appellant's brief.

**The decision of the district court is reproduced at "B" to the separate appendix to appellant's brief.

***Appellant's motion to amend the judgment is "E" to the separate appendix to appellant's brief.

the disease as long ago as 1966 and diagnosed as suffering from a chronic undifferentiated schizophrenia most recently as of September 26, 1973, only a few months prior to his trial.

Annexed to appellant's application were two letters by Edward Kaufman, M.D., former chief of psychiatric services at Lewisburg Penitentiary and in 1973 chief psychiatrist of the Lower East Side Services Center. Dr. Kaufman was familiar with appellant's case over a seven-year period. The most recent letter, dated October 17, 1973 (Exhibit B to appellant's application) was based upon interviews with appellant over a period of years up to September 26, 1973; pre-sentence reports; talks with appellant's family; and previous court appearances. The letter* includes the following observations:

When seen on Sept. 26, Mr. Newfield was much the same as he had been in my previous contacts with him. His anxiety was as intense, if not more so, than in prior contacts. He was quite tremulous. His speech was extremely rambling, accusatorial and tangential and he would deviate from an initial point for up to ten minutes and would not return to the subject unless directly brought back to it by the interviewer. As he became more relaxed during the interview, his anxiety diminished as did his circumstantial speech. He was also quite depressed during the interview and cried freely, particularly when discussing the extent of his symptoms and his good feelings about being able to communicate with me again.

He presents numerous paranoid phenomena. Included in these is a detailed preoccupation with the Federal Government being particularly

*The letter is reproduced in its entirety as "F" to the separate appendix to appellant's brief.

out to get and kill him. He is also pre-occupied with paranoid fantasies, such as the glass blocks on the walls are two-way mirrors. This thought is more a fantasy than a delusion. He stated that he no longer heard the hissing sounds which he had heard previously. However, he is currently troubled by what is best termed a somatic delusion, i.e., the feeling that he is charged with electricity to a point where he is actually experiencing voltage.

* * *

Edward Newfield was first diagnosed as schizophrenic at Buffalo State Hospital in 1954. The report of the Board of Examiners at Lewisburg in Feb. 1966 confirmed this diagnosis. His present anxiety, impairment of associative thought processes and paranoid thinking support a diagnosis of Chronic Undifferentiated Schizophrenia.

It is notable that this letter was annexed to the pre-sentence report received by the trial judge before imposing sentence upon appellant on the conviction underlying the instant proceedings.

Also annexed to appellant's petition (as Exhibit A) was a "Report of Psychiatric Board of Examiners," dated February 11, 1966,* also authored by Dr. Kaufman. The report was filed in reference to a \$2255 motion in an entirely different case made by appellant challenging a plea of guilty entered some time prior to 1966. The report reveals a 20-year history of addiction by appellant, and a "paranoid manner;" the report also

*The report is reproduced as "G" to the separate appendix to appellant's brief.

diagnoses appellant as "schizophrenic reaction, chronic undifferentiated type," but "not sufficient to warrant a diagnosis of paranoid schizophrenia." The report concluded that "it is felt" that appellant was competent at the time of his crime and at the time of his trial some time prior to 1966.

On March 10, 1976, again without any elaboration or response from the Government, the court denied appellant's application, summarily concluding that the files and records of the case conclusively showed that petitioner was entitled to no relief.* This appeal followed.

B. The "Files and Records"***

The docket sheet for appellant's bank robbery case and the district court file in that case fail to show the existence of any documents which refute appellant's allegations. There was apparently no written request by either the prosecution or the defense for a competency examination or hearing, and apparently neither was held. Instead, the only references prior to trial concerning appellant's health were the motions and orders for examinations of appellant's physical condition, dated June 26, 1972; October 4, 1972; October 18, 1972; and

*The court's March 10 order is reproduced as "C" to the separate appendix to appellant's brief.

**The docket sheet for Cr. 1972-110, appellant's conviction, is reproduced as "I" to appellant's separate appendix. The criminal file in that case is docketed with this Court as a supplemental record on appeal.

May 14, 1973, which apparently were made because of an acute heart attack appellant had suffered.

The record also fails to reveal whether the trial, which took place from May 21 to May 24, 1974, was marked by either bizarre or completely normal behavior on appellant's part, since the minutes of the trial are not presently a part of the record. Since a motion to withdraw appellant's appeal was granted by this Court on February 10, 1975 (see Appendix I), the trial minutes were never transcribed and are thus not a part of the record. Further, the minutes were apparently not ordered by the court below in its analysis of appellant's petition. Thus, the "files and records" do not disprove appellant's claim, and the files do not include a written record of the trial, which occurred virtually two years before the decision of appellant's application.

The only evidence from the "files and records" of the case relevant to competency were received by the court following the trial. Annexed to the pre-sentence report, transmitted to the court below prior to sentencing, were two letters describing appellant's mental condition. One of the letters was the report, dated October 17, 1973, by Dr. Kaufman, diagnosing appellant's condition as chronic undifferentiated schizophrenia, which was annexed as Exhibit B to appellant's motion to alter or amend the judgment. The other enclosure in the pre-sentence report is a letter from Dr. Morris Herman, dated September 13, 1977, based upon a single interview with

appellant and previous psychiatric reports. Among the relevant facts adduced in the letter is the doctor's observation that appellant was committed to Buffalo State Hospital in 1954, that he was diagnosed as a schizophrenic individual in 1966, and that he has a long history of narcotics addiction. The letter concludes that there are "important personality defects in this man," but that "it is not clear that these defects reached the intensity to be considered as psychosis, although in 1966 he was designated schizophrenic. This can refer to a personality state, sometimes stated as schizoid rather than schizophrenic which does not ordinarily progress to a state of decomposition."*

*Dr. Herman's letter is reproduced as "H" to the separate appendix to appellant's brief.

ARGUMENT

Point I

SINCE THE MATERIALS IN APPELLANT'S PRE-SENTENCE REPORT PROVIDED REASONABLE CAUSE TO BELIEVE THAT APPELLANT MIGHT HAVE BEEN INCOMPETENT, IT WAS ERROR FOR THE TRIAL JUDGE TO HAVE FAILED TO ORDER A PSYCHIATRIC INQUIRY PURSUANT TO 18 U.S.C. §4244.

The district judge who conducted the trial and imposed sentence had before him substantial evidence in the psychiatric evaluations annexed to the pre-sentence report that appellant was suffering from serious mental illness during his trial. In the face of this evidence, the judge's failure to order a psychiatric examination of appellant was error.

Examinations of an accused to determine his competency to stand trial are governed by 18 U.S.C. §4244, which requires of the federal courts what Pate v. Robinson, 383 U.S. 375 (1966), found to be constitutionally required: an inquiry into competency at any time there is reasonable cause to believe that the accused may be incompetent. The statute provides that whenever a party or the court "has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense ..., the court shall cause the accused" to be examined by a psychiatrist as to his

mental condition. 18 U.S.C. §4244 (emphasis added); see United States v. Marshall, 458 F.2d 446, 450 (2d Cir. 1972); United States v. McEachern, 465 F.2d 833, 836 (5th Cir.), cert. denied, 409 U.S. 1043 (1972). Thus, the first step in the competency inquiry is a psychiatric examination of the defendant. United States v. Marshall, supra. And it is clear that a relatively low order of evidence is required before there is "reasonable cause" to believe that an accused "may be" incompetent, mandating an examination. See United States v. McEachern, supra, 465 F.2d at 836-837; Morris v. United States, 414 F.2d 258 (9th Cir. 1969); see also Saddler v. United States, 531 F.2d 83 (2d Cir. 1976); United States v. Polisi, 514 F.2d 977, 980 (2d Cir. 1975). It is following the examination, and depending upon the results secured thereby, that an evidentiary hearing may be required to be held. 18 U.S.C. §4244; United States v. Marshall, supra; United States v. McEachern, supra; United States v. Polisi, supra, 514 F.2d at 980. Moreover, there can be no doubt that even in the absence of a defense request, where the evidence before the court establishes reasonable cause to believe that the accused may be incompetent, the court is obliged sua sponte to grant an examination or hearing. Morris v. United States, supra; see United States v. Marshall, supra.

Although there is no evidence in this case that appellant's mental condition was placed in issue prior to sentencing, the psychiatric materials supplied to the court in the pre-sentence

report clearly established the reasonable cause necessary to require the court sua sponte to order a §4244 examination. The letter of Dr. Herman states that appellant had previously been committed by his family to a mental hospital, and concluded that appellant at least suffered from a "schizoid" personality. Dr. Kaufman's letter, based upon several observations over a seven-year period, is even more persuasive evidence that appellant may have been incompetent, for it describes appellant as presenting "paranoid phenomena," and diagnoses him as suffering from chronic undifferentiated schizophrenia, clearly placing competency in issue. Moreover, the Kaufman letter is replete with instances of the kind of behavior which would have made communication with counsel difficult, if not impossible: paranoid fantasies of two-way mirrors; a feeling that appellant was charged with electricity; constant deviations from the subject matter; and frequent crying spells.

The facts before the court below disclosed by the pre-sentence report calling for a competency examination are far stronger than those held sufficient to require a §4244 examination in Morris v. United States, supra, 414 F.2d 258. There, as here, the defendant, convicted of bank robbery, failed to move for a competency examination, nor did the Assistant United States Attorney request one. There, as here, until receipt of the pre-sentence report, there were no facts before the court sufficient to trigger proceedings under 18 U.S.C. §4244. The

Ninth Circuit continued:

But the history of mental illness and treatment, the finding that at a prior period appellant had at that time been found insane, although apparently found thereafter to have recovered his sanity and the prior findings at various times of a psychotic condition, all contained in the pre-sentence report, provided the "reasonable cause to believe"

Id., 414 F.2d at 259.

Thus, the judgment in Morris was vacated.

Also relevant is this Circuit's decision in United States v. Polisi, supra. There, the bank robbery defendant who had not requested a competency examination prior to trial was the subject of a pre-sentence report which evidenced that he was receiving medication as a result of a service-connected disability for "chronic brain syndrome associated with trauma with psychotic (schizophrenic) reaction" (id., 514 F.2d at 978). Noting these emotional problems, the trial court ordered Polisi examined for purposes of sentencing under 18 U.S.C. §4208(b). This examination resulted in the same diagnosis as the instant case: chronic undifferentiated schizophrenia. At sentencing, for the first time, defense counsel moved for a §4244 examination.

This Court held that the request for a §4244 competency examination was not satisfied by a §4208(b) study, and then held:

Since we find that the evidence of the appellant's psychiatric history in the pre-sentence report, coupled with the conclusions of the

§4208(b) study, at least provided the reasonable cause required by §4244, we conclude that the failure to determine that issue was erroneous.

Id., 514 F.2d at 980.

Here, as in Polisi, there has been a diagnosis of appellant as chronic undifferentiated schizophrenic at or near the time of trial; here, as in Polisi, there was evidence of an extended history of hospitalization or treatment; moreover, here, unlike Polisi, there was also evidence of a long history of narcotics addiction. Thus, "reasonable cause" to believe that appellant "may [have been]" incompetent was presented, and the trial court was obliged to order a §4244 examination. See also Saddler v. United States, supra; United States v. McEachern, supra; White v. United States, 470 F.2d 727 (5th Cir. 1972); United States v. Irvin, 450 F.2d 968 (9th Cir. 1971).

Point II

THE DISTRICT COURT ERRED BY FAILING
TO HOLD AN EVIDENTIARY HEARING PUR-
SUANT TO THE REQUEST FOR RELIEF UNDER
§2255.

In his §2255 petition and motion for reconsideration, appellant plainly alleged that he was incompetent by reason of mental disorder. The support for appellant's motion was substantial: two reports from the psychiatrist who had examined appellant.

The reports clearly establish appellant as a man who might not be able to aid and assist in his defense. Thus, the reports, in addition to citing a long history of mental illness of the most serious order, including a diagnosis of appellant as "schizophrenic" in 1954, repeated in 1966, and again in 1973, only months before appellant's trial, note observations of appellant's speech as "extremely rambling, circumstantial and tangential," causing him to deviate from questions asked, and picture a man "quite depressed," presenting "numerous paranoid phenomena" and "paranoid fantasies." Confronted with these reports as part of appellant's §2255 application, the court's obligation was clear: to hold an evidentiary hearing in an attempt to determine the issues of whether appellant was competent to stand trial and whether the evidence before the court and the Government at the time of appellant's conviction was such that it was error to have failed to examine appellant prior to sentencing. The court's decision to proceed without

a hearing, and its summary and totally unexplained decision that the "files and records" of the case conclusively show appellant not entitled to relief are erroneous, mandating a reversal.

Title 28 U.S.C. §2255 provides, in pertinent part:

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

An evidentiary hearing is not required in a §2255 proceeding when the allegations are insufficient in law, undisputed, immaterial, vague, conclusory, palpably false, or frivolous. Sanders v. United States, 373 U.S. 1, 19 (1963); Machibroda v. United States, 368 U.S. 487, 494-495 (1962); United States v. Malcolm, 432 F.2d 809, 812 (2d Cir. 1970).

There can be no doubt that appellant's claim that he was incompetent during trial by reason of his schizophrenia is legally sufficient to entitle him to relief. It is fundamental that the conviction of an accused while he is legally incompetent violates due process. Drope v. Missouri, 420 U.S. 162, 171-172 (1975). This claim may be raised for the first time in a collateral proceeding, for "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently "waive" his right to have the court determine his capacity to stand trial." Pate v. Robinson, supra, 383 U.S.

at 384.*

Moreover, the factual basis entitling appellant to a hearing is clear. Appellant's history of schizophrenia, a history which persisted until the time of trial, while not determinative of the issue of competency, was clearly relevant to the issue and provides a basis for a good faith belief that appellant might not have been competent to go to trial and assist in his defense. Cf., e.g., United States v. Polisi, supra, 514 F.2d at 980 (reasonable cause to believe defendant may be incompetent and examination required where history of psychiatric treatment and diagnosis, as here, of "chronic undifferentiated schizophrenia"); Morris v. United States, supra. Moreover, the specific observations by the psychiatrist, only months before trial, of appellant's irrationality, his paranoid fantasies (including electricity and government plots), and his unresponsive replies certainly suggest that appellant might have been unable to aid and assist in his defense. Cf. Drope v. Missouri, supra, 420 U.S. at 180 (irrational behavior relevant in examination of competency).

*Further, it is clear by now that appellant's claims that the court erred by failing to conduct an examination pursuant to 18 U.S.C. §4244, and that the Government erred by failing to bring information in its possession to the attention of the court may be asserted in a §2255 proceeding. See Davis v. United States, 417 U.S. 333, 342 (1974); Saddler v. United States, supra, 531 F.2d 83.

In short, appellant presented a legally sufficient claim, supplemented by specific medical support. In such a situation, it was fundamental error to fail to hold a hearing. Sanders v. United States, supra, 373 U.S. at 19; O'Neil v. United States, 486 F.2d 1034 (2d Cir. 1973); United States v. Miranda, 437 F.2d 1255 (2d Cir. 1971).

Indeed, the facts in this case are stronger than those held sufficient to require a hearing in this Circuit's leading case, United States v. Miranda, supra. There, the defendant alleged in a §2255 motion that he was incompetent to plead, since at the time of the plea he was being treated under heavy sedation at a psychiatric ward for a suicide attempt. The district court denied a hearing, relying upon records of a psychiatric examination finding Miranda not psychotic, the records of the plea and sentence where Miranda was coherent, and a pre-sentence report which concluded that Miranda was "relevant, coherent and direct, showing a remarkable memory for dates and events of his life."

Holding this evidence of competence insufficient, this Court reversed, enunciating the following standard for the circumstances when a §2255 hearing is required:

The general consensus of the courts which have considered the issue, therefore seems to be where no evidentiary facts are alleged to support a bald allegation of mental incompetence a hearing will not be required [citations omitted]. On the other hand, where the movant has raised detailed and controverted issues of fact, a hearing will be required.

Id., 437 F.2d at 1258.

Here, the medical diagnosis of appellant as paranoid and schizophrenic is more detailed than the observations in Miranda. Moreover, this Court has repeatedly reaffirmed its disinclination to sustain summary rejections of petitions for post conviction relief supported by sufficient allegations not clearly refuted by the files and records below. Taylor v. United States, 487 F.2d 307, 308 (2d Cir. 1973); see Dalli v. United States, 491 F.2d 758, 760 (2d Cir. 1974).

To say the least, the "files and records" of this case do not conclusively show a disentitlement to relief. Nothing in the pre-trial proceedings in this case even speaks to the issue of competency. Further, although appellant's behavior at trial is relevant to the issue of competency (Drope v. Missouri, supra, 420 U.S. at 180; Pate v. Robinson, supra), here such behavior has not been memorialized by a written record, and reliance on such a record to establish competency is thus foreclosed. Moreover, it cannot be concluded that the court below, in denying relief, was relying on its memory, then almost two years old, of the trial, for the court never so stated. The only post-trial materials bearing on competency are the letters contained in the pre-sentence report. These letters, one of which concludes that appellant was a schizoid personality, the other a "chronic undifferentiated schizophrenic" conclusively establish appellant's right to a hearing -- not the reverse. In fact, the only evidence in this case even remotely indicative of appellant's competency is the conclusion

of the report annexed as Exhibit A to appellant's motion for reconsideration of his §2255 application that in 1966 appellant was found to be competent to plead guilty to a crime that had occurred some time previous to the report. Obviously, the fact that seven or eight years prior to his trial in this case appellant had been found competent to plead guilty is not conclusive on the question of his competency to go to trial in 1973 or 1974: "[T]he competency of an accused cannot be rendered immutable historical fact, for the mental condition of an accused may change drastically in a matter of months." Rose v. United States, 513 F.2d 1251, 1257 n.5 (8th Cir. 1975). Here, it was eight years -- not a matter of months. Indeed, the fact that appellant's mental condition in 1966 merited psychiatric evaluation of his competency should have keyed the court in to the need to conduct a similar evaluation here. Clearly then, the district court erred in its summary dismissal of the §2255 application without resort to an evidentiary hearing.

Moreover, the court's summary resolution was improper for yet another reason. In his §2255 application, appellant alleged that the Government was aware of his schizophrenic -- and thus potentially incompetent -- condition, yet failed to move for a competency examination. If appellant's assertion is correct, error was committed. "When the United States Attorney has information causing him to have reasonable doubt as to the competency of a criminal defendant he is duty bound

to report it to the court and to request a mental examination."

United States v. Varner, 467 F.2d 659, 661 (5th Cir. 1972).

Here, the Government was not even permitted to respond to appellant's allegations, which were sufficient in fact and law. Accordingly, the case must be remanded and a hearing must be held to decide appellant's petition.*

*It has now been over three years since appellant's trial, a fact that raises the distinct possibility that a nunc pro tunc determination of appellant's competency may no longer be feasible. Accordingly, upon remand to the district court, the court should be directed to consider first whether a meaningful nunc pro tunc hearing can be conducted. If no such proceeding is feasible, the court must be directed to issue the writ and afford appellant the opportunity to plead anew. Rose v. United States, supra, 513 F.2d at 1257.

CONCLUSION

For the foregoing reasons, the orders of the district court must be reversed and the case remanded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

June 15, 1977

I hereby certify that a copy of this brief and appendix has been mailed to the United States Attorney for the ~~Western~~ District of New York.

David I. Gell